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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 349

E. R. CHRISTENSON, d/b/a Christenson Electric Company,
Petitioner,

vs.

DIVERSIFIED BUILDERS INCORPORATED, JOHNSON CONSTRUCTION CO., a corporation, and KAISER COMPANY, a corporation, Joint Venturers; FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Maryland corporation; AMERICAN REINSURANCE COMPANY, a New York corporation; GENERAL REINSURANCE CORPORATION, a New York corporation; EMPLOYERS REINSURANCE CORPORATION, a Missouri corporation; NORTH AMERICAN REINSURANCE CORPORATION, a New York corporation; FEDERAL INSURANCE COMPANY, a New Jersey corporation; and GENERAL INSURANCE COMPANY, a Washington corporation,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner's Statement of the Case is essentially correct, with the following exceptions:

1. The Counter-Claim against Diversified and the Complaint for Complete Relief against the parties, including the sureties, set forth the same legal and factual issues, all of which related to the breach of contract allegedly committed by Diversified. (R. 17-20, 27-30)

2. In Paragraph 4 of Petitioner's Statement of the Case, he erroneously states that the jury trial "was denied by the District Court (R. 72-73, 75, 77, 86)." To the contrary, the court did not deny the jury trial, but reserved ruling thereon until a later date. In so doing, the court stated:

> "You are going to have a hard time with me on that subject, but we will reserve the ruling until we get down and know more about the case." (R. 72)

Actually, no ruling was ever made. (R. 85-88, 89-93)

3. Contrary to Petitioner's statement on Page 6 of his Petition, to the effect that Petitioner's renewed demand for jury trial was taken under advisement, the record shows that said renewed demand and Petitioner's Motion for consideration thereof, were not ever argued to the Judge at the hearing on January 7, 1963. (R. 82, 85-87) The case went to trial, therefore, without Petitioner ever bringing the matter to the Court's attention again (R. 89-93) and without seeking any further ruling.

ARGUMENT

POINT I.

CONTRARY TO PETITIONER'S POINT I, THE COURT BELOW DID NOT RULE SO THAT AS A MATTER OF LAW A LITIGANT'S

RIGHT TO A JURY TRIAL IS WAIVED BY THE JOINDER OF PARTIES AND OF ISSUES.

Petitioner's Point I is an erroneous conclusion. The Circuit Court's decision does not, as a matter of law, automatically deprive a litigant of his right to a jury trial because of the joinder of causes of action under the Federal Rules of Civil Procedure. In support of this rather specious argument, Petitioner continues to cite cases such as *Mecker v. Ambassador Oil Corporation*, 375 U.S. 160, and *Simler v. Conner*, 372 U.S. 221, as well as a host of other cases in the same vein, all of which are not applicable. Those cited cases involve the joinder of equitable and legal issues where a proper demand for a jury trial has been made. The basic question in said cases is whether or not under the Federal Rules, the joinder of the non-jury equitable cause with the jury legal cause can deprive the party of a jury trial on the legal cause. Obviously, our case is much different and as is properly stated by the Circuit Court in it's Footnote 1, on page A-12, Appendix "D," the cited cases are inapplicable. The Circuit Court's decision is certainly not in opposition to those well accepted authorities.

In the case at bar, the facts and the law dictate the propriety of the lower court's decision. The original equitable causes asserted against the United States and Thiokol Chemical Corporation were removed from the law suit by stipulation long before trial. (R. 93, 107) The remaining issues between Diversified and the Petitioner were legal and involved damages and the breach of the Subcontract. (R. 15-39, 53-55) The sureties were added (R. 52, 53), but

the factual issues remained the same. The only new issue raised by Petitioner against the sureties involved the legal (as distinguished from factual) question of liability under the bond and under the Utah bonding statutes. (R. 29-33) The execution of the bond was admitted (R. 37) and obviously, the application of the statute was a legal problem.

Although Petitioner did have an independent and direct cause of action against the sureties, as was properly pointed out by the lower court, (Appendix "D," Page A-15) the liabilities were conditioned by the terms of the bond and the statute upon the same breach of contract by Diversified. (R. 30, 31) In other words, unless the breach of Diversified's obligations were first shown, there obviously was no liability on the part of the sureties.

It is well accepted that it is the factual issues in the law suit that are reserved for trial by jury under the Constitution. Please see *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, and *Slocum* v. *New York Life Insurance Company*, 228 U.S. 364. The adding of additional parties, unless new factual issues are thereby raised, does not create a new right to demand a jury. Please see *American Fidelity & Casualty Company* v. *All American Bus Lines*, 190 F. 2d 234, 10th Circuit, Certiorari Denied, 342 U.S. 851, and *Parissi* v. *Foley*, 203 F. 2d 454, 2d Circuit (1953).

In the case at bar, the jury trial on the issues framed by the Complaint, Counterclaim and Reply were waived because of the untimely filing of the Demand for a jury trial. (R. 53-55, 58; Appendix "D," Page A-15) These issues were properly tried by the court within its discretion under Rule 39, Federal Rules of Civil Procedure. No

new factual issues were left to be tried in the cause brought by Petitioner against the sureties. As the lower court has properly held, these issues having been properly tried without a jury by reason of the Petitioner's waiver, cannot now be retried. The effect of the timely demand relating to the cause against the sureties was to make triable by jury any factual issues not already tried under the main cause of action. As pointed out above, there were no such factual issues, since the liability of the sureties was conditioned upon the outcome of the cause of action against Diversified.

POINT II.

THE DECISION OF THE LOWER COURT IS NOT INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT OR OF COURTS OF OTHER JURISDICTIONS.

Petitioner states that this decision is contrary to prior decisions of the United States Supreme Court and decisions of other Circuit Courts. A consideration of the cases cited by Petitioner shows that without exception, they involved joinder of equitable and legal issues. In the subject case the equitable issues were dismissed out of the law suit prior to trial and the only issues remaining at trial were legal. A further distinction lies in the fact that in those cases, timely demands for a jury were made — which is not our case. Those cases hold that equitable issues which either have been tried or should be tried in the same case with legal issues under the Federal Rules, cannot preclude the jury trial of legal issues where there is a proper jury demand. The Circuit Court recognized this distinction (which Petitioner has failed to recognize) by noting and distinguishing the *Meeker* and *Simler*, supra, cases. (Appendix "D," Page A-14).

Petitioner continually argues that he has been penalized by taking advantage of the joinder provisions in the Federal Rules. Any penalty suffered by Petitioner has resulted from his waiver of the jury trial, by not filing his demand within the 10-day period. See *United States* v. *Moore*, 340 U.S. 616; *Ward* v. *Brown*, 10th Circuit, 301 F. 2d 445; 5 Moores Federal Practice (2d Ed.) Par. 38-43, pp. 332-338.

The trial court, under Rules 39 and 42, has discretion in granting a jury trial where there has been a demand, timely as to some litigants and untimely to others. 5 Moores Federal Practice (2d Ed.), Par. 38-39, p. 318. There seems little merit in Petitioner's argument.

SUMMARY

The Circuit Court properly held that Petitioner had waived his right to a jury trial, and that under the facts of the case, the factual issues so involved should not be tried again. This decision is not contrary to, but is consistent with the decisions of the Supreme Court and Circuit Courts. Respondents respectfully submit the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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